No. 57

In the Supreme Court of the United States

OCTOBER TERM, 1945

COURTNEY M. MABEE, CHARLES K. BARNUM, EDWARD G. TOMPKINS, NORTON MOCKRIDGE, GEORGE S. TROW, WILLIAM L. O'DONOVAN, PETITIONERS

v.

WHITE PLAINS PUBLISHING COMPANY, INC.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION AS AMICUS CURIAE

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This is an employee suit under Section 16 (b) of the Fair Labor Standards Act. It raises the question of the applicability of the Act to employees of a small daily newspaper. The trial court (New York Sup. Ct., Spec. Term, Westchester Co.) held, upon a motion to dismiss, that respondent's newspaper is engaged in interstate commerce subject to the Fair Labor Standards Act and that the case should go to trial on the question of fact whether the activities of any of the plaintiffs related to the interstate business of

the newspaper (R. 89). After trial, the court found that the activities of the plaintiffs "related to interstate commerce" and that each of the plaintiffs was engaged "in [a] process or occupation necessary to the production" of goods for such commerce within the meaning of Section 3 (j) of the Fair Labor Standards Act (R. 89–90). The Appellate Division reversed the judgment "on the law and on the facts" on the ground that the newspaper and its employees "were not engaged in commerce within the meaning of the Act, and Congress never intended it to apply to the situation disclosed by this record" (R. 98). It stated that the newspaper was engaged in "a strictly local as distinguished from a national activity, i. e., the local business of publishing a local newspaper," that it "did not produce goods for commerce within the meaning of the Act and, consequently, plaintiffs were not engaged in any process or occupation necessary to the production thereof" (R. 99). The admitted out-of-State circulation, the Appellate Division ruled, was an "insignificant and inconsequential" part, "not a regular part" of the newspaper's business and that the doctrine of *de minimis* applied to render the Act inapplicable (R. 99, 100, 101). The continuous receipt of news, intelligence, advertising and other material from out-of-State sources was held insufficient to subject the newspaper to the Act, on the ground that the interstate movement of

such news and materials ended when they arrived at the newspaper's plant (R. 101–102).

The Court of Appeals affirmed the decision of the Appellate Division without opinion. In granting the motion to amend the remittitur the Court of Appeals stated that "there was presently and necessarily passed upon the question of whether the respondent [the newspaper] was engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938," and that its decision was that the newspaper "was not engaged in interstate commerce or in the production of goods within the meaning of the Fair Labor Standards Act of 1938" (R. 105).

It is the Administrator's position that (1) respondent's newspaper is "engaged in commerce" within the meaning and intent of the Act by reason of its continuous receipt of news, intelligence, advertising and other matter from out-of-State sources, and its constant use of the channels of interstate communication, regardless of the amount of its out-of-State circulation; and (2) to the extent that the paper circulates out-of-State, it is engaged in commerce and in the production of goods for commerce within the scope of the Act, and such production is not outside of the scope of the Act as *de minimis* where the out-of-State circulation, however small, is a regular and recurrent part, as distinguished from casual, occasional or sporadic incidents of the newspaper's circulation.

In referring to the *newspaper* as being engaged in commerce and in the production of goods for commerce, we do not mean to imply that the nature of its business is determinative of the applicability of the Act to petitioners. It is recognized that the application of the Act is "dependent upon the character of the employees' activities." *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 524. The record shows that the petitioners here were all editorial or reportorial employees. At least some of them had regular duties in connection with the receipt and handling of news as it came over the teletype (R. 42–43, 51, 66, 67), and all of them presumably participated in the preparation of the paper, some copies of which circulated out of the State. This brief is written on the assumption that petitioners were engaged in such of the newspaper's activities as we claim were interstate commerce or the production of goods for commerce.[1] No attempt is made here to

[1] A particular employee may, of course, be entitled to the benefits of the Act in a particular work-week in which he spends a substantial amount of his time in covered work even though the employer's interstate business, in relation to its business as a whole, might not be a sufficiently regular part of its normal business to warrant coverage of other employees. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 572; *Walling* v. *Peoples Packing Co.*, 132 F. 2d 236, 240 (C. C. A. 10); *Montalvo* v. *Puerto Rico Tobacco Co.*, 6 Wage Hour Rept. 44 (D. P. R., 1943); *Keen* v. *Mid-Continent Petroleum Corp.*, 8 Wage Hour Rept. 1029, 1037 (N. D. Iowa, 1945).

answer the question whether each or any of the particular petitioners has adequately proved that he performed such activities to an extent sufficient to bring him within the scope of the Act. For convenience, therefore, the brief speaks in terms of the newspaper's activities rather than of employees' duties.[2]

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[2] It is not clear from the opinion of the Appellate Division and the ruling of the Court of Appeals whether they recognized this principle or realized that the fact that the employer's business may be *substantially* local is not decisive. Conceivably some of petitioners may have been sufficiently engaged in work relating to respondent's interstate transactions to come within the scope of the Act, even should it be assumed that the business generally was local and that its production for commerce was *de minimis*. By the same token at times some of the petitioners may have been engaged in the interstate activities while other petitioners were not so engaged.

We think that the only practical means for determining this problem is the method outlined by the Fourth Circuit in the case of *Guess* v. *Montague*, 140 F. 2d 500, which appears to be the method impliedly recognized by this Court's decision in the *United States* v. *Darby*, 312 U. S. 100. The Fourth Circuit ruled that a *prima facie* showing, entitling the employee to the protection of the Act, is made where it appears that the interstate and intrastate activities are commingled in the employer's operations, and it is a fair inference from the evidence that the employee worked on the interstate as well as intrastate business; and that the burden is then upon the employer to produce evidence that certain employees "did not render any service in connection with its interstate business." 140 F. 2d at 504. See also Interpretative Bulletin No. 1, par. 5. 1942 Wage Hour Man. 24; Interpretative Bulletin No. 5, par. 9, 1942 Wage Hour Man. 28.

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1. A DAILY NEWSPAPER SUCH AS THAT INVOLVED HERE IS ENGAGED IN INTERSTATE COMMERCE WITHIN THE MEANING OF THE ACT REGARDLESS OF THE AMOUNT OF ITS OUT-OF-STATE CIRCULATION

Respondent's newspaper, like practically all daily newspapers, involves continuous receipt of out-of-State news and advertising material and the "constant use of channels of interstate and foreign communications." See *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 128. For the greater part of the period involved in this suit (from March 1939 to January 1941) respondent subscribed to the International News Service, which maintained two teletype machines in respondent's newsroom (R. 28, 30, 38, 50–53, 66, 67). Prior to March 1939, respondent received the Associated Press Service over a tie-up wire with the County News Bureau (R. 50). The record clearly establishes that use of the national and international news received over these wires was particularly significant and extensive during the period involved in this suit because it was the period immediately preceding and following the outbreak of war in Europe (R. 53, 54).[3] In addition to the teletype services, respond-

[3] When the war broke out the paper ran a full page advertisement stating that due to the fact that the war would influence everyone's life it would expand the international news and that the paper was "taking the service of the International News from March 1, 1939, and * * * would continue to give local news, but at the same time * * * would implement it with national and international news because of everyone's interest in world conditions" (R. 53).

ent subscribed to the usual run of comic strips, syndicated news features, feature stories and pictorial services (R. 31, 36, 54, 69), which came regularly from out-of-State sources (R. 31, 35, 37, 54). Also, the paper had the usual kind and amount of national advertising for which it received mats and other material from the Meyer Both national advertising agency in Chicago and the Basil Smith national advertising agency in Philadelphia (R. 57–58).

Respondent is engaged in interstate commerce within the meaning of the Fair Labor Standards Act by virtue of its constant and extensive utilization of the channels of interstate and foreign communications, and its function of receiving news and intelligence in a continuous stream from nationwide and worldwide sources (see *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 128; *Associated Press* v. *United States*, Nos. 57, 58, 59, October Term, 1944, slip op., p. 9), and also by reason of its continuous interstate traffic in syndicated news stories, pictorial services, advertising mats and materials and other supplies (see *Indiana Farmer's Guide Co.* v. *Prairie Co.*, 293 U. S. 268, 276; *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 106–107), as well as by virtue of its out-of-State distribution.

The decision below in the instant case is the only decision under the Act which has rejected

these views. See *Sun Pub. Co.* v. *Walling*, 140 F. 2d 445, 448 (C. C. A. 6), certiorari denied, 322 U. S. 728; *Fleming* v. *Lowell Sun Co.*, 36 F. Supp. 320 (D. Mass.), reversed on other grounds, 120 F. 2d 213 (C. C. A. 1), affirmed per curiam, 315 U. S. 784; *Fleming* v. *A. H. Belo Corp.*, 36 F. Supp. 907, 909 (N. D. Tex.), affirmed, 121 F. 2d 207 (C. C. A. 5), affirmed on other grounds, 316 U. S. 624. See also *Schroepfer* v. *A. S. Abell Co.*, 138 F. 2d 111 (C. C. A. 4), certiorari denied, 321 U. S. 763;[4] *Walling* v. *Oklahoma Press Pub. Co.*, 7 Wage Hour Rept. 655 (E. D. Okla., 1944), affirmed on other grounds, 147 F. 2d 658 (C. C. A. 10), awaiting decision in this Court, No. 61; *Fleming* v. *Gazette Pub. Co.*, 4 Wage Hour Rept. 328 (N. D. Ohio), reversed by consent on the ground that administrative authority to issue a subpoena

[4] The reliance by the Appellate Division upon the *Schroepfer* case is misplaced. The Fourth Circuit explicitly recognized that some of the newspaper's employees were unquestionably engaged in interstate commerce. The first sentence of the court's opinion, immediately following the summary of facts, reads as follows (p. 113): "There is no question but that the defendant is engaged in interstate commerce with respect to the publication of its papers, the gathering of news therefor and the sale of the portion of its papers sent out of the state." The suit involved the coverage of newspaper rackmen whose only duties related to the delivery of papers to local distribution racks and who "had nothing to do with collecting news, assembling it, printing the paper, or any other activity in which interstate commerce was involved" (138 F. 2d at 112).

duces tecum is not delegable; *Walling* v. *Times Co.*, 7 Wage Hour Rept. 599 (S. D. Ohio, 1944).[5]

A newspaper engaged constantly in such interstate and foreign communications and business cannot fairly or realistically be characterized as a "strictly local as distinguished from a national activity" (see R. 99). As the detailed factual report on *Small Daily Newspapers*,[6] p. 56, prepared by the Wage and Hour Division of the Department of Labor points out:

> The modern daily newspaper is one of the important instruments for the transmission of intelligence, within and across state boundaries. It is one of the chief means by which the citizens of the country gain the knowledge of political events which helps them to participate in the affairs of the country, one of the chief means by which the Government informs the citizenry

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[5] In the course of the hearings on the wage and hour bills the then Assistant Attorney General expressed the view that he did not believe that "the fact that the newspaper got its news from an out of the State source would be sufficient to make the newspaper itself in interstate commerce." This was admittedly not a considered opinion and was carefully qualified by the statement that he had "never investigated the subject" and that "there might be other conditions" which might lead to a different opinion. Joint Hearings on S. 2475 and H. R. 7200, 75th Cong., 1st Sess., pt. 1, p. 81.

[6] This report is in the record as defendant's ex. 15, omitted from the printed record pursuant to stipulation R. 88. It was prepared in order to supply factual information bearing on proposals to Congress to exempt from the Act daily newspapers with less than 3,000 or 5,000 circulation.

> of the conduct of national affairs, an important means for the transmission of commercial and industrial intelligence necessary for the conduct of modern business enterprise. Specifically, the daily newspaper supplies news which must be transmitted speedily from source to reader; it supplies syndicated features for the reader's education and entertainment; it supplies trade, legal, weather, and crop reports which form the basis of business and legal transactions and of crop plantings; and it acts as a medium for the conveyance of messages from advertisers to readers, thereby inspiring and implementing the flow of trade and commerce. Its place in the national economy can very well be regarded as that of an essential agency of communication, at the same time that it is a productive enterprise similar to any other factory operation.

The fact that some of the activities of the newspaper, if considered separately, may be regarded as wholly local (see *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 261; *Blumenstock Bros.* v. *Curtis Pub. Co.*, 252 U. S. 436, relied upon by respondent (see br. in opp., p. 16)), does not warrant the conclusion that other aspects of the business are not in interstate commerce. See *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533; see also *Polish Nat. Alliance* v. *National Labor Relations Board*, 322 U. S. 643. Moreover, a business which is held to be local and "separable from interstate commerce" for

State taxation purposes (see *Western Live Stock* case, *supra,* at 261), may nevertheless constitute interstate commerce regulable under the commerce clause of the Federal Constitution. *McGoldrick* v. *Berwind-White Mining Co.,* 309 U. S. 33. This Court has recognized that such tax decisions "are not particularly helpful in determining the scope of the [Fair Labor Standards] Act." *Overstreet* v. *North Shore Corp.,* 318 U. S. 125 at 132. See also *Walling* v. *Patton-Tulley Transp. Co.,* 134 F. 2d 945 (C. C. A. 6).

The case of *Blumenstock Bros.,* relied upon by respondent (br. in opp., p. 16), is inapplicable here for the same reasons it was held inapposite in *Indiana Farmers Guide Co.* v. *Prairie Co.,* 293 U. S. 268. Much more interstate activity is involved here than the mere making of advertising contracts. Respondent's newspaper, in addition to the constant receipt of news and intelligence via teletype, includes the obtaining of advertising, the constant transportation between States of mats and other materials to be used in setting up advertisements, and continuous interstate traffic in syndicated features, comic strips, pictorial matter and substantial quantities of other supplies. See *Farmer's Guide Co.* v. *Prairie Co., supra,* at 276. See also *International Textbook Co.* v. *Pigg, supra.*

The reasoning of the Appellate Division that the news reports, intelligence, advertising and supplies came to rest and their interstate movement ended when they arrived at the newspaper's

place of business (R. 101–102), even if assumed to be sound with respect to the subsequent handling and publication of the news and other materials after they have been received,[7] at least cannot be sustained with respect to the function and

[7] It does not appear that the instant case requires a determination of the question how far, beyond the duties of receiving and assembling the news items immediately upon their arrival, the interstate commerce continues. It may be noted, however, that although clear judicial authority may be lacking, there is sound economic and practical support for the view that the newspaper itself is a channel or instrumentality for "communication among the several States" (see Sec. 3 (b)), in much the same way as the telephone, telegraph and press wire services are. See *Small Daily Newspaper Study*, *supra*, pp. 15, 18, 56, 57.

As the *Small Daily Newspaper Study*, p. 56, points out, newspaper enterprises are generally classified as "manufacturing" or "producing" establishments in the Census of Manufactures and directories of manufacturing industries, while economic or historical studies of the national economy usually group the newspaper industry with communication industries. See, for instance, Thompson and Jones, *Economic Development of the United States* (Macmillan, 1939), p. 55; Walter W. Jennings, *History of Economic Progress in the United States* (Crowell, New York, 1926), p. 511; Malcolm Willey and Stuart Rice, *Communications Agencies and Social Life* (Report of the President's Committee on Social Trends, McGraw-Hill, 1933), c. 14, pp. 156–176; the issues of *Public Opinion Quarterly*. For a description of the importance of the newspaper as an agency of communication, see Robert and Helen Lynd, *Middletown*, pp. 471, ff.

If the newspaper is regarded as itself a channel or instrumentality of interstate communication, the interstate commerce, we believe, may not be said to end immediately upon the receipt of the news (cf. *Schroepfer* v. *A. S. Abell Co.*, 138 F. 2d 111 (C. C. A. 4), certiorari denied, 321 U. S. 763), but would include also the publication and distribution of the news.

duty of receiving such goods as they arrive. See *Walling* v. *Jacksonville Paper Co.*, 128 F. 2d 395, 398 (C. C. A. 5), affirmed and modified, 317 U. S. 564; *Clyde* v. *Broderick*, 144 F. 2d 348 (C. C. A. 10); *Walling* v. *Goldblatt Bros.*, 128 F. 2d 778 (C. C. A. 7), certiorari denied, 318 U. S. 757; *Walling* v. *Mutual Wholesale Food and Supply Co.*, 46 F. Supp. 939, 947–948 (D. Minn.), affirmed, 141 F. 2d 33 (C. C. A. 8).

We submit that the Appellate Division and the Court of Appeals were in error in their approach to the question whether petitioners were engaged in commerce, and that the instant case may well be determined on the ground that petitioners are so engaged, without reference to the question whether the out-of-State circulation was *de minimis*. If the case is not determinable on this ground, there remains the question whether the court below properly applied the doctrine of *de minimis*.

2. A NEWSPAPER WITH ANY OUT-OF-STATE CIRCULATION IS ENGAGED IN PRODUCTION OF GOODS FOR COMMERCE WITHIN THE MEANING AND INTENT OF THE ACT, AND SUCH PRODUCTION IS NOT OUTSIDE THE SCOPE OF THE ACT AS *de minimis* WHERE IT IS A REGULAR AND RECURRENT CHARACTERISTIC OF THE NEWSPAPER'S CIRCULATION

Since concededly some of respondent's papers were produced for out-of-State circulation, there can be no question that respondent is engaged in the production of goods for commerce to some extent.

The only question is whether such production is outside the scope of the Act under the *de minimis* doctrine. The literal language of the Act as well as the legislative history support the conclusion that the Act encompasses the production of "any" goods for out-of-State shipment, and that such production, however small in volume, is not outside the scope of the Act as *de minimis,* at least in the case where it is a regular and recurrent part of the business. The fact that the volume of interstate shipment is small may have a bearing on the question whether a particular employee has adequately proved the relationship of his work to the interstate business,[8] but the application of the Act to the work relating to such interstate business is not dependent upon its volume.

The literal language of the Act plainly supports this view. As this Court stated in *United States* v. *Darby,* 312 U. S. 100, 123, the Act makes "no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer."[9] There is nothing in the language of the Act indicating that the volume of the production for commerce must be substantial or more than a certain amount in order for the Act to apply. On the contrary, Section 15 (a) (1) makes it a violation

[8] See *supra,* pp. 4–5.

[9] This has been the consistent view of the Administrator. See Interpretative Bulletin No. 5, par. 9, 1942 Wage Hour Man. 27–28.

to ship in commerce "*any* goods in the production of which *any* employee was employed in violation of" the minimum wage and overtime requirement of the Act [italics supplied]. *United States* v. *Rosenwasser,* 323 U. S. 360, 362–363.

The view that the Act is applicable to the production of "any goods" for commerce is further substantiated by the fact that the "substantial" standard which characterized some of the earlier drafts of the Act was completely omitted from the coverage provisions of the Act as enacted. In some of the earlier bills coverage was to be determined by a board or the Secretary of Labor on the basis of findings, *inter alia,* that employees were engaged in the production of goods "which are sold or shipped to a *substantial* extent [10] in interstate commerce" or that an industry was "dependent for its existence upon *substantial* purchases and sales of goods in commerce" or was related to commerce "in other respects close and *substantial*" [11] [italics supplied]. On the other hand, the Act as enacted, instead of delegating authority to any executive or administrative officer to determine the scope of coverage, specified the persons to whom the Act should apply—to

[10] Contained in S. 2475, as passed by the Senate August 2, 1937; contained in H. R. 7200 as introduced in the House, May 24, 1937, and S. 2475, as reported in the House August 6, 1937.

[11] Contained in confidential committee print of April 13, 1938; contained in bill as passed by House on May 6, 1938.

"each" and "any" employee "engaged in commerce or in the production of goods for commerce" (Secs. 6 (a) and 7 (a)). The Act was not "conditioned * * * upon any particular volume or proportion of interstate" business of the employer. Cf. *Connecticut Light & Power Co. v. Federal Power Comm.*, 324 U. S. 515, 536.[12]

It may be argued that while Congress did not condition coverage upon the existence of a "substantial" amount or proportion of interstate business, nevertheless it does not follow that the doctrine of *de minimis* may not apply. In this connection, the definition of "substantial" contained in the bills which incorporated the substantial standard as a test of coverage, throws light on the scope of coverage contemplated by Congress and is indicative of the legislative view of what might be regarded as *de minimis* in the application of the Fair Labor Standards Act. "To a substantial extent" was defined to mean "not casually, sporadically or accidentally but as a settled or recurrent characteristic of the matter or occupation described or a portion thereof, which need not be a large or preponderant portion thereof"

[12] See also *Warren-Bradshaw Drilling Co. v. Hall*, 317 U. S. 88, where this Court held employees entitled to recover under the Act on the ground that "some of the oil produced ultimately found its way into interstate commerce" (317 U. S. at 91). "The Court did not say how much, nor whether the amount made any difference" (*Berry v. 34 Irving Place Corp.*, 52 F. Supp. 875, 879 (S. D. N. Y.)).

(Black-Connery Bill, as introduced in the Senate, S. 2475, Sec. 2 (a) (26).[13]

The view that Congress intended that the Act should apply to daily newspapers whose out-of-State circulation is small is substantiated by the explicit exemption provided in Section 13 (a) (8) for "any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published." Representative Creal of Kentucky, in proposing this exemption, asserted that (83 Cong. Rec. Pt. 7, p. 7445):

> * * * under this bill, because 1 or 2 percent of a paper's circulation goes outside to people who want to get the home-town paper to see whether or not Lucy got married, or whether Sally's baby has been born yet, because that infinitesimal bit of their business is with people outside the county, these publications fall under the provisions of this bill * * *.

[13] These provisions with some language changes in Sec. 9 (a) remained in the prints of the bill considered by the Senate Committee on Education and Labor. They were contained in the bill reported in the Senate July 18, 1937, and the bill passed by the Senate August 2, 1937. After S. 2475 was passed by the Senate it was substituted by the House Committee on Labor for H. R. 7200 and was reported to the House on August 6, 1937. The House Committee on Labor, upon reconvening after the House on December 17, 1937, voted to recommit S. 2475, again took up the consideration of S. 2475 and rewrote the bill, eliminating among other provisions, the sections and definitions referred to above.

It appears to have been assumed that, without the coverage exemption, a newspaper with any regular out-of-State circulation, however small, would be within the scope of the Act. It is significant that Congress has not seen fit to expand the exemption to include *daily* newspapers with a small out-of-State circulation, although similar reasons might be urged in support of such an exemption. The numerous attempts subsequent to the enactment of the Act to secure a similar exemption for daily newspapers with less than 3,000 or 5,000 total circulation have failed. See H. R. 7200, S. 2475, 75th Cong., 1st Sess.; H. R. 4900, H. R. 7340, 76th Cong., 1st Sess.; S. 3047, S. 4385, 76th Cong., 2d Sess.; H. R. 64, H. R. 4208, S. 284, S. 1310, 77th Cong., 1st Sess. (*Small Daily Newspaper Study*, pp. 67–68).

The legislative debates and hearings relating specifically to the application of the Act to newspapers, although inconclusive, lend further support to the view that the Act was intended to cover a daily newspaper with a very small out-of-State circulation. In the course of Congressional discussions with respect to the meaning of "commerce" as contemplated by the Act, several colloquies took place indicating that the sponsors of the Act considered such newspapers within the scope of the proposed legislation. During one such discussion, Senator Glass propounded the question whether he was engaged in commerce if he owned a newspaper with 20,000 subscribers,

which distributed its entire output in Virginia, except for 10 copies sent to extrastate subscribers. Senator Borah, who was called upon to answer because of his reputation as an expert on constitutional law, responded as follows (83 Cong. Rec., part 8, p. 9172):

> Mr. President, if the Senator is purchasing his goods for the purpose of making up his newspaper in different States, and he takes them to a particular place where he uses them, and he transmits his newspapers into other States, I do not think the number—the number, 10 or 20 or 30—is controlling. I think the Senator is engaged in interstate commerce.
>
> [Senator] Glass: "Well, I do not."

The same opinion was expressed by the then Assistant Attorney General in his testimony before the joint committees of Congress. Joint Hearings on S. 2475 and H. R. 7200, pt. 1, pp. 81–82.[14]

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[14] The bills then under discussion contained the "affecting commerce" language, but both Senator Borah and the Assistant Attorney General spoke in terms of engaging in commerce and production for commerce. In any event, regardless of which concept of "commerce" they had in mind, their remarks with respect to the significance of the amount or volume of interstate commerce in determining the application of the Act are nonetheless pertinent. In the application of the doctrine of *de minimis* there would seem to be no reason for differentiating between the language "affecting commerce" and the language "engaged in commerce or in the production of goods for commerce." See *Southern Calif. Freight Forwarders* v. *McKeown*, 148 F. 2d 890, 891 (C. C. A. 9).

The courts are virtually uniform in holding that an employee is within the protection of the Act if the interstate transactions to which his duties are necessary constitute a regular part of the business and are not casual, isolated or sporadic. See *New Mexico Public Service Co.* v. *Engel*, 145 F. 2d 636 (C. C. A. 10); *Davis* v. *Goodman Lumber Co.*, 133 F. 2d 52 (C. C. A. 4); *Schmidt* v. *Peoples Telephone Union of Maryville, Mo.*, 138 F. 2d 13, 15 (C. C. A. 8); *Sun Pub. Co.* v. *Walling*, 140 F. 2d 445 (C. C. A. 6), certiorari denied, 322 U. S. 728; *McKeown* v. *Southern Calif. Freight Forwarders*, 52 F. Supp. 331 (S. D. Calif.), affirmed, 148 F. 2d 890 (C. C. A. 9), certiorari denied, October 8, 1945, this Term, No. 245; *Muldowney* v. *Seaberg Elevator Co.*, 39 F. Supp. 275 (E. D. N. Y.); *Strand* v. *Garden Valley Telephone Co.*, 51 F. Supp. 898 (D. Minn.); *Fleming* v. *Lowell Sun Co.*, 36 F. Supp. 320 (D. Mass.), reversed, 120 F. 2d 213 (C. C. A. 1), affirmed, 315 U. S. 784.[15] As was said in the *Engel* case, an employee's interstate activities are sufficiently substantial to bring him within the scope of the Act

[15] For other lower court decisions to the same effect see *Ling* v. *Currier Lumber Co.*, 50 F. Supp. 204 (E. D. Mich.); *Drake* v. *Hirsch*, 40 F. Supp. 290 (N. D. Ga.); *Elmore* v. *Cromer & Beaty Co.*, 6 Wage Hour Rept. 861 (W. D. S. C., 1943); *Cooper* v. *Gas Corp.*, 4 Wage Hour Rept. 550 (Cir. Ct. Mich., 1941); *Loeb* v. *Ideal Packing Co.*, 7 Wage Hour Rept. 397 (Cir. Ct. Wis., Mil. Co., 1944); and *Sykes* v. *Lochmann*, 6 Wage Hour Rept. 217 (Sup. Ct. Kan., 1943); *Keen* v. *Mid-Continent Petroleum Corp.*, 8 Wage Hour Rept. 1029, 1037–1038 (N. D. Iowa, 1945).

if such activities constitute "a part of the work-a-day duties of the employee," and his contribution to production for commerce is "both consistent and continuous," "not merely sporadic and isolated" (145 F. 2d at 640). The "character rather than the size of an activity is the controlling feature." *Davis* v. *Goodman Lumber Co., supra,* at 53. Where the interstate activities are "not casual nor spasmodic, but rather a continuous, regular and integral part of [the] everyday and every week business," the doctrine of *de minimis* has no application. See *McKeown* v. *Southern Calif. Freight Forwarders, supra,* at 333.[16]

[16] The opinion of the Appellate Division characterizes respondent's out-of-State circulation as "not regular" but "casual and incidental" (R. 101). The opinion does not make clear whether it was assuming that such out-of-State circulation was a daily or weekly occurrence. It states that the out-of-State circulation was "not a regular part of appellant's [the newspaper's] business but only an inconsequential incident resulting from appellant's desire to serve the convenience of a few of its subscribers sojourning out of the State" (R. 100), and implies that it was solely for "subscribers temporarily out of the state" (R. 101).

It seems reasonably clear from the evidence in the record that the out-of-State circulation, though small, was a regular daily occurrence. The evidence consisted of references to the audit reports for three twelve-month periods, made by the Audit Bureau of Circulation, which showed an out-of-State circulation of 43, 46 and 40 subscriptions for the years ending March 31, 1939, and 1940 and 1941, respectively. (R. 58.) While there was testimony that "a certain number" of local residents would have the papers sent to them when they were on vacation out of the State (R. 56), and a few of the copies went to men in the service (R. 58), there was no

CONCLUSION

We submit, therefore, that the New York Court of Appeals erroneously concluded that respondent was not engaged in commerce or in the production of goods for commerce within the meaning of the Act.

Respectfully submitted.

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NOVEMBER 1945.

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evidence that all or even most of the out-of-State circulation was of this character.

It seems a fair inference that the court below characterized the out-of-State circulation as irregular and casual, primarily if not solely, because of its small size and because the bulk of the circulation was local, and not because the out-of-State circulation was not a regular occurrence.

U. S. GOVERNMENT PRINTING OFFICE: 1945

SUPREME COURT OF THE UNITED STATES.

No. 57.—October Term, 1945.

Courtney M. Mabee, Charles K. Barnum, Edward G. Tompkins, et al., Petitioners,
vs.
White Plains Publishing Company, Inc.

On Writ of Certiorari to the Court of Appeals of the State of New York.

[February 11, 1946.]

Mr. Justice Douglas delivered the opinion of the Court.

Respondent publishes a daily newspaper at White Plains, New York. During the period relevant here, its daily circulation ranged from 9,000 to 11,000 copies. It had no desire for and made no effort to secure out-of-state circulation. Practically all of its circulation was local. But about one-half of 1 per cent was regularly out-of-state.[1] Petitioners are some of respondent's employees. They brought this suit in the New York courts to recover overtime compensation, liquidated damages and counsel fees pursuant to § 16(b) of the Fair Labor Standards Act of 1938. 52 Stat. 1069, 29 U. S. C. § 216(b). The Supreme Court gave judgment for the petitioners. 179 Misc. 832, 180 Misc. 8. The Appellate Division reversed and ordered the complaint to be dismissed. 267 App. Div. 284. That judgment was affirmed by the Court of Appeals without opinion. 293 N. Y. 781, 294 N. Y. 701. The case is here on a petition for a writ of certiorari which we granted because of the probable conflict between the decision below and those from the federal courts.[2]

The Appellate Division applied the maxim *de minimis* to exclude respondent from the provisions of the Act. We think that was error. The Court indicated in *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 607, that the operation of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. § 151) was not dependent on "any particular volume of commerce affected more

[1] About 45 copies daily. There appears to have been an out-of-state circulation of 43, 46, and 40 for the years ending March 31, 1939, 1940, and 1941 respectively.

[2] Cf. Davis *v.* Goodman Lbr. Co., 133 F. 2d 52, 53; Sun Publishing Co. *v.* Walling, 140 F. 2d 445, 448; New Mexico Public Service Co. *v.* Engel, 145 F. 2d 636, 640.

than that to which courts would apply the maxim *de minimis.*" That Act,[3] unlike the present one (*Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 570-571), regulates labor disputes "affecting" commerce. 49 Stat. 450, 29 U. S. C. § 152. We need not stop to consider what different scope, if any the maximum *de minimis* might have in cases arising thereunder. Here Congress had made no distinction on the basis of volume of business. By § 15(a)(1) it has made unlawful the shipment in commerce of "*any* goods in the production of which *any* employee was employed in violation of" the overtime and minimum wage requirements of the Act. Though we assume that sporadic or occasional shipments of insubstantial amounts of goods were not intended to be included in that prohibition, there is no warrant for assuming that regular shipments in commerce are to be included or excluded dependent on their size. That has been the consistent position of the Administrator. Interpretative Bull. No. 5, par. 9 (1939), 1944-45 Wage Hour Man. 21. His rulings and interpretations "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140.

We stated in *United States* v. *Darby*, 312 U. S. 100, 123, "Congress, to attain its objective in the suppression of nationwide competition in interstate commerce by goods produced under substandard labor conditions, has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer. It recognized that in present day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great." And see *Warren-Bradshaw Co.* v. *Hall*, 317 U. S. 88, 91. That view is borne out by the legislative history of the Act. Earlier drafts had embodied the "substantial" standard.[4]

[3] Sec. 1 of that Act is a statement of the policy of Congress. It states that the denial by employers of the right of the employees to bargain collectively has the intent or effect of burdening or obstructing commerce by "materially affecting" the flow of goods from or into the channels of commerce or by "causing a diminution of employment and wages in such volume as substantially to impair or disrupt" the market for such goods.

[4] See, for example, H. R. 7200, 75th Cong., 1st Sess., introduced May 24, 1937. It provided for a Labor Standards Board to administer the Act. The Board was to be given the power to establish minimum wages when it found, *inter alia*, that wages lower than a minimum fair wage were paid to employees "engaged in the production of goods which are sold or shipped to a substantial extent in interstate commerce." § 5(a).

The Confidential Committee Print of April 13, 1938, containing a proposed amendment to S. 2475, 75th Cong., 1st Sess., and embodied in the Committee Print of April 15, 1938, S. 2475, 75th Cong., 3d Sess., would have limited the applicability of the Act to employers "engaged in commerce in any industry affecting commerce. . . ." §§ 4, 5. It was further provided by § 6 of the draft that the Secretary of Labor should, after notice and hearing, determine the relation of the various industries to commerce. Only if the Secretary found that the industry was (a) "dependent for its existence upon substantial purchases or sales of goods in commerce and upon transportation in commerce", or (b) "Nation-wide in . . . scope", or (c) related to commerce "in other respects close and substantial", could the Secretary issue an order declaring the industry to be one affecting commerce and thus within the purview of the Act.

These were omitted from the coverage provisions of the one which became the law. Moreover, one of the exemptions written into the Act extends to "any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published." § 13(a)(8). Representative Creal of Kentucky proposed this exemption. He stated that "under this bill, because 1 or 2 per cent of a paper's circulation goes outside to people who want to get the home-town paper to see whether or not Lucy got married, or whether Sally's baby has been born yet, because that infinitesimal bit of their business is with people outside the county, these publishers fall under the provisions of this bill, when on each side of this little printshop are the butcher and the baker, who are exempt and who are financially better fixed than he is." 83 Cong. Rec. p. 7445. No such exemption for daily newspapers was granted.[5] No exemption on the basis of volume of out-of-state circulation was written into the Act. Rather the exemption of the small weeklies or semi-weeklies seems to have been adopted on the assumption that without it a newspaper with a regular out-of-state circulation, no matter how small, would be under the Act. The choice Congress made was not the exemption of newspapers with small out-of-state circulations but the exemption of certain types of small newspapers. We would change the nature of the exemption which Congress saw fit to grant, if we applied the maxim *de minimis* to this type of case. We would also disregard the plain language of § 15(a)(1) prohibiting the shipment in commerce of "any goods"

[5] A number of bills have been introduced since the passage of the Act to secure a similar exemption for daily newspapers but none of them has passed. See H. R. 7340, 76th Cong., 1st Sess.; S. 4385, 76th Cong., 3d Sess.; H. R. 64, H. R. 4208, S. 1310, S. 284, 77th Cong, 1st Sess.

in the production of which "any employee" was employed in violation of the overtime and minimum wage requirements of the Act.

Respondent argues that to bring it under the Act, while the small weeklies or semi-weeklies are exempt by reason of § 13(a)(8), is to sanction a discrimination against the daily papers in violation of the principles announced in *Grosjean* v. *American Press Co.*, 297 U. S. 233. Volume of circulation, frequency of issue, and area of distribution are said to be an improper basis of classification. Moreover, it is said that the Act lays a direct burden on the press in violation of the First Amendment. The *Grosjean* case is not in point here. There the press was singled out for special taxation and the tax was graduated in accordance with volume of circulation. No such vice inheres in this legislation. As the press has business aspects it has no special immunity from laws applicable to business in general. *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 132-133. And the exemption of small weeklies and semi-weeklies is not a "deliberate and calculated device" to penalize a certain group of newspapers. *Grosjean* v. *American Press Co., supra*, p. 250. As we have seen, it was inserted to put those papers more on a parity with other small town enterprises. 83 Cong. Rec. 7445. The Fifth Amendment does not require full and uniform exercise of the commerce power. Congress may weigh relative needs and restrict the application of a legislative policy to less than the entire field. *Steward Machine Co.* v. *Davis*, 301 U. S. 548; *Currin* v. *Wallace*, 306 U. S. 1, 13-14.

We hold that respondent is engaged in the production of goods for commerce. That, of course, does not mean that these petitioners, its employees, are covered by the Act. The applicability of the Act to them is dependent on the character of their work. *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 524; *Walling* v. *Jacksonville Paper Co., supra*, pp. 571-572. We express no opinion on that phase of the case, as the New York appellate courts did not pass on it. Since the judgment below must be reversed, the question whether the Act is applicable to these employees will be open on the remand of the cause.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES.

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vs.
White Plains Publishing Company, Inc.

On Writ of Certiorari to the Court of Appeals of the State of New York.

[February 11, 1946.]

Mr. Justice Murphy, dissenting.

I agree that to print approximately 10,000 newspapers a day and regularly to send 45 of them, or ½ of 1%, out of the state is to produce goods for interstate commerce. But I cannot agree that Congress meant to include a business of that nature within the ambit of the Fair Labor Standards Act of 1938.

This Court, in *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 606, stated that "The amount of the commerce regulated is of special significance only to the extent that Congress may be taken to have excluded commerce of small volume from the operation of its regulatory measure by express prohibition or fair implication." Concededly, Congress has not excluded commerce of small volume from the coverage of the Fair Labor Standards Act by "express prohibition." But certainly the "fair implication" is one of exclusion. On numerous occasions we have pointed out that Congress in this Act did not exercise the full scope of its commerce power, *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 522-523, and that Congress plainly indicated its purpose to leave local business to the protection of the states so far as wage and hour problems were concerned, *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 570; *Phillips Co.* v. *Walling*, 324 U. S. 490, 497.

In my opinion, a company that produces 99½% of its products for local commerce is essentially and realistically a local business. True, ½ of 1% of its production is for interstate commerce, thus subjecting it to the constitutional power of Congress when and if exercised. But that fact does not make it any less a local business, which we have said Congress plainly excluded from this Act.

I would therefore affirm the judgment below in this respect.